

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 5983
DATE COMPLAINT FILED: March 18, 2008
DATE OF NOTIFICATION: March 25, 2008
DATE OF LAST RESPONSE: April 21, 2008
DATE ACTIVATED: May 6, 2008

EXPIRATION OF STATUTE January 2012
OF LIMITATIONS:

COMPLAINANT: Stephen L. Love

RESPONDENTS: Eric Nelson Roberson
Eric Roberson Senate Exploratory Committee
Eric Roberson for Congress Campaign
and Brynne Sissom, in her official capacity as Treasurer

RELEVANT STATUTES AND REGULATIONS: 2 U.S.C. § 431
2 U.S.C. § 432(e)
2 U.S.C. § 433
2 U.S.C. § 434(b)
2 U.S.C. § 441a(a)
2 U.S.C. § 441b
11 C.F.R. § 114.9(a)
11 C.F.R. § 100.72
11 C.F.R. § 100.131
11 C.F.R. § 101.1(a)
11 C.F.R. § 104.3

INTERNAL RECORDS Disclosure Reports
CHECKED:

FEDERAL AGENCIES None
CHECKED:

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I. INTRODUCTION

This matter involves alleged misuse of the "testing the waters" exemption by an individual who considered a campaign for the U. S. Senate during the first half of 2007 without filing a statement of candidacy, but became a candidate for the U.S. House of Representatives later in the 2008 election cycle. Complainant alleges that Eric Nelson Roberson violated the Federal Election Campaign Act of 1971, as amended, ("the Act" and "FECA") by failing to file a statement of candidacy for his Senate candidacy, and that Eric Nelson Roberson and the Eric Roberson Senate Exploratory Committee (the "Exploratory Committee") violated the Act by inappropriately using the "testing the waters" exemption to avoid registering and reporting as a political committee. See 2 U.S.C. §§ 432(e)(1), 433(a) and 434(b). The Complaint also alleges that the Eric Roberson for Congress Campaign and Brynne Sissom, in her official capacity as Treasurer (the "Congressional Committee"), accepted and failed to disclose an excessive in-kind contribution by using his employer's office as his campaign headquarters. See 2 U.S.C. §§ 441a(a) and 434(b).

Respondents deny the allegations and assert that Complainant has drawn inferences that are inaccurate and unsubstantiated. Response at 1-3. Roberson asserts that he never held himself out as a Senatorial candidate and that his Senatorial exploratory efforts ceased long before he decided to run for a seat in the U.S. House of Representatives. *Id.* at 3-5. Roberson also asserts that his Congressional Committee did not receive any in-kind contribution from his employer, and that he paid for any incidental use of office space by his campaign. *Id.* at 7-8.

Based on our review of the Complaint, the Response and publicly available information, it appears that Roberson's exploration of a possible Senate campaign never crossed the line from "testing the waters" and ceased around June 2007. It also appears that Roberson's January 2008

1 Statement of Candidacy for the congressional seat, and subsequent Congressional Committee
2 filings and disclosures were made in a timely manner. Accordingly, we recommend that the
3 Commission find no reason to believe that Eric Roberson violated 2 U.S.C. § 432(e)(1) by failing
4 to file a Statement of Candidacy in connection with the Senate election, or that Eric Roberson
5 and the Eric Roberson Senate Exploratory Committee violated 2 U.S.C. §§ 433(a) and 434(b) by
6 failing to file a Statement of Organization and other disclosure reports. We also recommend that
7 that the Commission exercise prosecutorial discretion and dismiss the allegation that Eric
8 Roberson and the Eric Roberson Senate Exploratory Committee violated 2 U.S.C. § 441a(a) by
9 making excessive contributions to another candidate's exploratory committee. Finally, we
10 recommend that the Commission find no reason to believe that the Eric Roberson for Congress
11 Campaign and Brynne Sissom, in her official capacity as Treasurer, violated 2 U.S.C. §§ 434(b)
12 and 441a(a) by accepting and failing to disclose an excessive in-kind contribution.

13 **II. FACTUAL AND LEGAL ANALYSIS**

14 In January 2007, Eric Roberson started an exploratory committee for a potential run for a
15 U.S. Senate seat in Texas, the Eric Roberson Senate Exploratory Committee. By March 2007,
16 Roberson had raised approximately \$9,300 from a variety of donors through personal
17 solicitations, without making any written appeals. Response at 3. From January through June
18 2007, when the Senate exploratory efforts are reported to have ceased, Roberson activities
19 included: (1) purchasing the website URL address www.ericroberson.org, but not publishing the
20 site to the public; (2) having talks with Party Leaders, including County Chairs, State Democratic
21 Executive Committee Members and the State Party Chair, as well as rank-and-file Democrats;
22 (3) having detailed discussions with political consultants; and (4) speaking with other potential
23 Democratic candidates for the U.S. Senate seat to assess his prospects. Response at 4-5.

1 Roberson asserts that he did not hold himself out to the public or anyone with which he spoke as
2 having made a final decision to become a Senate candidate. *Id.*

3 In early Spring 2007, Roberson claims he met with Mikal Watts, who was also exploring
4 a Senate campaign. Response at 1-2. After that meeting, Roberson states that he determined that
5 Watts had a better chance at the candidacy and decided to end his exploratory efforts. He also
6 decided to sponsor an exploratory fundraising dinner for Watts, for which the Exploratory
7 Committee spent \$1,400. *Id.* Soon thereafter, the Exploratory Committee made cash
8 contributions to Watts' exploratory committee totaling \$2,555, amounts that Watts later refunded
9 after he decided not to run. *Id.* at 5-6.

10 Roberson states that in mid-December 2007, six months after ceasing all exploratory
11 activities in connection with the Senate seat, he became aware that the previous District 32nd
12 Democratic Congressional candidate was not going to seek the Party's nomination. Response at
13 2. He asserts that in late December 2007 he decided to run for the Congressional seat, paid the
14 fee to get on the ballot and transitioned funds from his dormant Senatorial exploratory committee
15 to a Congressional campaign committee. *Id.* Roberson states he then reactivated his URL
16 address, now displaying the "Eric Roberson for Congress Campaign" name, filed his Statement
17 of Candidacy on January 4, 2008 and the Committee's Statement of Organization on January 14,
18 2008. *Id.* at 5. The Congressional Committee filed its first pre-primary disclosure report in
19 February 2008, covering the period 12/19/07 – 2/13/08, and filed all subsequent disclosure
20 reports in a timely manner. During his Congressional primary campaign from January-April
21 2008, Roberson used his office at the Mulligan Law Firm, a sole proprietorship, as his
22 Committee's nominal headquarters. The primary election was held March 4, 2008 and a primary
23 runoff election was held April 8, 2008.

1 Complainant, who was one of Roberson's opponents in the March 2008 Texas 32nd
2 Congressional District Democratic Primary, and in a subsequent April 2008 primary run-off, lists
3 the following as evidence that Respondents violated the FECA:

- 4 • Roberson and the Exploratory Committee accepted more than \$9,300 during the
5 first quarter of 2007, and that this amount exceeded the threshold for registering
6 as a candidate and the funds needed to simply test the waters;
- 7 • The Exploratory Committee purportedly used at least two variations on its name
8 (Eric Roberson Senate Exploratory Committee and Senatorial Exploratory
9 Committee) in FEC Reports, suggesting the existence of multiple committees;
- 10 • Roberson and the Exploratory Committee put up a website in violation of the
11 prohibition on public political advertising while testing the waters;
- 12 • Roberson appeared to have joined a candidate-endorsing organization, Texas
13 Values in Action (TEX VAC), when he made a \$300 disbursement to the group in
14 May 2007;
- 15 • Roberson and the Exploratory Committee made in-kind contributions and cash
16 donations to another candidate's exploratory committee;
- 17 • Roberson tested the waters for a full year between formation of the Senate
18 Exploratory Committee and the declaration of his Congressional candidacy; and
- 19 • Eric Roberson for Congress Campaign failed to report the in-kind contribution it
20 received from Roberson's employer, the Mulligan Law Firm, who allows him to
21 use his business address as the Congressional Committee's campaign
22 headquarters.

23 The allegations relating to the activities of the Senate Exploratory Committee and the
24 Congressional Committee are discussed separately below.

25 **A. Senate Exploratory Committee**

26 **1. Roberson's "Testing the Waters" Status**

27 The Act provides that an individual becomes a "candidate" when he or she has received
28 or made in excess of \$5,000 in contributions or expenditures. 2 U.S.C. § 431(2). Achieving
29 "candidate" status triggers registration and reporting requirements for the candidate and for his

1 principal campaign committee. Within 15 days of becoming a candidate, the individual must file
2 a statement of candidacy with the Commission that designates the candidate's principal
3 campaign committee. 2 U.S.C. § 432(e)(1); *see also* 11 C.F.R. § 101.1(a). The principal
4 campaign committee must file a statement of organization no later than ten days after it has been
5 designated by the candidate. 2 U.S.C. § 433(a). All reportable amounts from the beginning of
6 the "testing the waters" period must be filed with the first financial disclosure report filed by
7 such committee, even if the amounts were received or expended prior to the current reporting
8 period. *See* 11 C.F.R. § 104.3(a) and (b).

9 However, the Commission's regulations provide that the terms "contribution" and
10 "expenditure" do not include funds received or payments made solely to determine whether an
11 individual should become a candidate. 11 C.F.R. §§ 100.72(a) and 100.131(a). Thus, an
12 individual may raise or spend more than \$5,000 without becoming a candidate if his or her
13 activities are permissible "testing the waters" activities, such as conducting polls, making
14 telephone calls, and travel. *Id.* The Commission has emphasized the narrow scope of this
15 exemption to the Act's disclosure requirements. *See Explanation and Justification for*
16 *Regulations on Payments Received for Testing the Waters Activities*, 50 Fed. Reg. 9992, 9993
17 (1985) ("The Commission has, therefore, amended the rules to ensure that the 'testing the
18 waters' exemptions will not be extended beyond their original purpose. Specifically, these
19 provisions are intended to be limited exemptions from the reporting requirements of the
20 Act . . .").

21 When an individual raises or spends more than \$5,000 and engages in activities that
22 indicate he or she has decided to run for a particular office, the "testing the waters" exemption is
23 no longer available. These activities include: raising funds in excess of what could reasonably be

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1 expected to be used for exploratory activities or activities designed to amass funds to be spent
2 after becoming a candidate; making or authorizing written or oral statements that refer to the
3 individual as a candidate for a particular office; or conducting activities in close proximity to the
4 election or over a protracted period of time. 11 C.F.R. §§ 100.72(b) and 100.131(b).

5 The information submitted in response to the Complaint, as well as the publicly available
6 information does not suggest that Roberson engaged in the kind of conduct described in
7 11 C.F.R. §§ 100.72(b) and 100.131(b) that would remove him from the "testing the waters"
8 exemption. Although Complainant alleged that \$9,300 is an excessive amount of cash to receive
9 or spend for an exploratory effort, Respondent argues that other candidates raise and spend
10 hundreds of thousands of dollars and take several months to test the waters. Response at p. 3.
11 After Roberson passed the \$5,000 threshold, he made inquiries with the Commission to ascertain
12 the regulations for the "testing the waters" exemption, and asserts that this contact confirmed his
13 understanding that he was not required to register and report as long as he had not decided to
14 become a candidate, had never held himself out as a candidate, and had never behaved in a
15 manner to reflect a decision to become a candidate. *Id.*

16 The disclosure report for the Exploratory Committee shows no receipts (other than the
17 refund of a prior contribution to another candidate's exploratory committee) and only minimal
18 expenditures between June and December 2007. There are no published event schedules or any
19 other evidence of activities conducted by the Exploratory Committee. There are also no public
20 statements by Roberson or others that might indicate Roberson actually had made the decision to
21 become a Senate candidate.

22 Roberson states that while he purchased a URL address comprised of his name
23 (www.ericroberson.org) in February 2007, he did not publish his web address and only friends,

1 political consultants and website developers working on the site reviewed its contents, while he
2 experimented with different looks, functions, and audio/video input. *Id.* At all times during the
3 exploratory period the moniker, "Roberson Senate Exploratory Committee" was prominently
4 displayed on the site. *Id.* After June 2007, he contends the website was pulled down and an
5 "Under Construction" page was the only item viewable on the internet, until it was reconstructed
6 as a Congressional campaign website in 2008. *Id.* A search of archived internet and media files
7 has found no references to Roberson's original website or the Senate Exploratory Committee.

8 The Complaint asserts that the Exploratory Committee's disbursement of \$300 to Texas
9 Values in Action PAC ("TEX VAC"), which is characterized as a candidate endorsing
10 organization, was to obtain an endorsement, and thus proof of Roberson's candidacy. Roberson,
11 on the other hand, describes the disbursement as payment for a dinner event sponsored by the
12 organization, and not a membership fee. *Id.* at 5. Roberson asserts that he is not a member of
13 the organization, but attended the dinner, "to meet important Democratic Party leaders and
14 additionally gauge the waters ... and the various names being floated about [for the] Senate run."
15 *Id.* There is no information to contradict these contentions.

16 From June 2007 to December 2007, the Exploratory Committee remained dormant except
17 for minimal expenses relating to maintaining the website URL address. *Id.* at 4-5. The
18 Exploratory Committee's disbursements reflect expenses associated with maintaining the
19 website and URL address, a few staff meetings, purchasing of office supplies, stationary, and
20 minimal photocopying and averaged a few hundred dollars a month. Because there is no
21 indication that Roberson crossed the line from "testing the waters" to becoming a Senatorial
22 candidate, subject to the Act's filing and reporting requirements, see 11 C.F.R. §§ 100.72(b) and
23 100.131(b), we recommend the Commission find there is no reason to believe that Eric Roberson

1 violated 2 U.S.C. § 432(e)(1), or that Eric Roberson or Eric Roberson Senate Exploratory
2 Committee violated 2 U.S.C. §§ 433(a) and 434(b).

3 **2. Exploratory Committee Contributions to Another Candidate**

4 As discussed above, in Spring 2007, Roberson met with Mikal Watts, who was also
5 exploring a Senate campaign, and decided to end his exploratory efforts and instead support
6 Watts. Response at 1-2. On June 18, 2007, Roberson co-hosted a dinner for Mikal Watts, for
7 which the Roberson Exploratory Committee spent \$1,400 for food and drinks. The Roberson
8 Exploratory Committee also made cash contributions to Watts' exploratory committee totaling
9 \$2,555. *Id.* at 5-6. This resulted in a total Exploratory Committee contribution to Watts in the
10 amount of \$3,955. Roberson asserts that he contacted the FEC prior to expending the funds, "to
11 insure that transferring money from [his] exploratory Committee to [Mikal Watts'] was
12 appropriate." *Id.* at 2. Watts later decided not to run for the Senate seat and refunded the \$2,555
13 cash donation to the Roberson Exploratory Committee.

14 The Act provides that all contributions must comply with the limitations and prohibitions
15 of the Act. *See* 2 U.S.C. § 441b. Specifically, the Act limits the amount of any contribution to a
16 candidate for federal office or his authorized political committee, which in the aggregate,
17 exceeds \$2,000 per election. *See* 2 U.S.C. § 441a(a)(1)(A). Because Mikal Watts was himself
18 "testing the waters" and never became a candidate, Roberson's donations would not have been
19 deemed "contributions" under the Act. *See* 11 C.F.R. § 100.72. However, if Watts had become
20 a candidate, Roberson's contributions would have exceeded the statutory limits by \$1,955.
21 Because the Watts Committee refunded the entire excessive contribution after Watts decided not
22 to become a candidate, and as a matter of prosecutorial discretion, we are recommending the
23 Commission dismiss any allegation that the Exploratory Committee violated 2 U.S.C. § 441a(a).

3. Exploratory Committee Reporting Violations

Complainant alleges that Roberson illegally maintained two exploratory committees and failed to file accurate and complete disclosure reports for these multiple political committees. Complaint at 1. This allegation is based on the fact that both the names "Eric Roberson Senate Exploratory Committee" and "Senatorial Exploratory Committee" appear in the "Name of Committee" section of disclosure reports submitted by Roberson to the Commission along with the initial reports filed by the Congressional Committee. *Id.* The Complaint also alleges that one committee, the Senate Exploratory Committee, reported receiving a "refunded \$2,555 donation" from Mikal Watts when it had never reported making such a contribution. Complaint at 2.

Roberson maintains that there was only one Committee and that the use of the term "Senatorial Exploratory Committee" was simply shorthand that he used in a few pages of the multi-page filings, but which referred to the "Eric Roberson Senate Exploratory Committee," and that all reporting referred to the activities of a single committee. Response at 3-4. Roberson's response and filings with the Commission, as well as publicly available information suggest that there was a single Exploratory Committee. The disclosure reports clearly reflect the receipts and disbursements of a single committee and the use of slightly different committee names, both of which include the words "Exploratory Committee" and two derivations of the word "Senate" (*i.e.*, Senate and Senatorial), does not mean there were two different committees. Moreover, because the information indicates there was only one committee, Complainant's allegations that the Exploratory Committee fraudulently reported the refund of a contribution that it never received is without merit. The Exploratory Committee reported making two contributions to the Watts' exploratory committee -- \$2,000 on June 19, 2007 and \$555.08 on July 2, 2007—the refund of these donations, in the amount of \$2,555, was received on December 11, 2007.

1 Accordingly, we recommend the Commission find no reason to believe the Exploratory
2 Committee violated 2 U.S.C. § 434(b).

3 **B. Congressional Committee/Candidacy**

4 During his Congressional primary campaign from January-April 2008, Roberson used his
5 office at the Mulligan Law Firm, a sole proprietorship, as his Committee's nominal headquarters.
6 Roberson asserts that the use of the facilities was done under an agreement with the Mulligan
7 Law Firm. Response at 7-8. He further contends that his use of the office for Committee
8 business was incidental, and restricted to a few hours a week. *Id.* at 8. His headquarters
9 occupied no additional space other than his regular business office, he used his cell phone as a
10 contact number, he used the office telephone less than one hour a week for Committee-related
11 business, the office had no dedicated telephone or fax lines, and was essentially nothing more
12 than an address where mail could be sent or volunteers could pick up materials, which were
13 stored in the trunk of his car or in a small section of his office closet. *Id.* Staff meetings were
14 conducted at one of the local eateries in the area. *Id.*

15 The Complaint alleges that the use of the Mulligan Law Firm office by the Congressional
16 Committee amounted to an in-kind contribution that was excessive and not disclosed to the
17 Commission. While Roberson asserts that his use of his office at the Law Firm was incidental
18 and permissible under his employer's policy of allowing employees to use their offices on a
19 limited basis for personal activities, he acknowledges that there may be some ambiguity as to
20 whether the Act's corporate/union incidental use exception set forth in 11 C.F.R. § 114.9(a) is
21 applied to an office owned by a sole proprietorship. Response at 7-8. Contemporaneously with
22 the initial use of the office space in 2008, Roberson ascertained the fair market value of an
23 executive suite "cyber office" package in the building in which his office is located as \$130. *Id.*

1 at 8-9. This includes up to 20 hours a month in dedicated office usage, use of a receptionist for
2 visitors and phone calls, receipt of facsimiles, closet space, a mail box and facilities for "at cost"
3 photocopying and metered mail or courier services, is \$130 a month. *Id.* Assuming *arguendo*
4 that the incidental use exception does not apply, the value that the campaign received from the
5 use of the office space would be approximately \$500. *Id.* Thus, the Congressional Committee
6 subsequently disclosed in its 2008 April Quarterly Report the \$500 as a debt owed by the
7 Congressional Committee to the Mulligan Law Firm. *Id.*

8 The Act permits the "incidental use" of a candidate's corporate office for campaign
9 activity, see 11 C.F.R. § 114.9(1), and mandates that all in-kind contributions to be subject to the
10 Act's contribution limits and reporting requirements. See U.S.C. §§ 441a(a) and 434(b).
11 Roberson's use of the office space appears to have been minimal, and the Congressional
12 Committee also reported the purported fair market value of the office space as a debt to the
13 Mulligan Law Firm in its 2008 April Quarterly Report. As such, there does not appear to have
14 been any excessive contribution. Accordingly, we recommend that the Commission find no
15 reason to believe that the Eric Roberson for Congress Campaign and Brynne Sissom, in her
16 official capacity as Treasurer, violated 2 U.S.C. §§ 441a(a) and 434(b).

17 **III. RECOMMENDATIONS**

- 18 1. Find no reason to believe that Eric Nelson Roberson violated 2 U.S.C. § 432(e)(1)
19 by failing to file a Statement of Candidacy in connection with his Senate
20 campaign.
- 21 2. Find no reason to believe that Eric Nelson Roberson and Eric Roberson Senate
22 Exploratory Committee violated 2 U.S.C. § 433(a) by failing to file a Statement of
23 Organization;
- 24 3. Find no reason to believe that Eric Nelson Roberson and Eric Roberson Senate
25 Exploratory Committee violated 2 U.S.C. § 434(b) by failing to file disclosure
26 reports;

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4. Dismiss the allegation that Eric Nelson Roberson and Eric Roberson Senate Exploratory Committee violated 2 U.S.C. § 441a(a) by making excessive contributions to another candidate's exploratory committee;
5. Find no reason to believe that Eric Roberson for Congress Campaign and Brynne Sissom, in her official capacity as Treasurer, violated 2 U.S.C. § 441a(a) by accepting an excessive in-kind contribution from the Mulligan Law Firm;
6. Find no reason to believe that Eric Roberson for Congress Campaign and Brynne Sissom, in her official capacity as Treasurer, violated 2 U.S.C. § 434(b) by failing to disclose an in-kind contribution from the Mulligan Law Firm;
7. Approve the attached Factual and Legal Analysis;
8. Approve the appropriate letters; and
9. Close the file.

Thomasenia P. Duncan
General Counsel

Date

BY:

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